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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 SARA HARRIS,

12 Plaintiff,

13 vs.

14 SYCUAN BAND OF DIEGUENO
MISSION INDIANS, DOES 1-X,

15 Defendants.

CASE NO. 08cv2111 WQH (AJB)

ORDER

16 HAYES, Judge:

17 The matter before the Court is the Motion to Dismiss the First Amended Complaint
18 (Doc. # 12).

19 **Background**

20 On November 17, 2008, Plaintiff initiated this action by filing a complaint (Doc. # 1).
21 The complaint sought to enforce an arbitration award totaling \$160,00.00 for physical injuries
22 allegedly suffered by Plaintiff as a result of the conduct of one of Defendant's employees. The
23 complaint alleged that the Court had subject matter jurisdiction pursuant to the Federal
24 Arbitration Act ("FAA"), 9 U.S.C. section 1, *et seq.* On March 2, 2009, this Court issued an
25 order dismissing the complaint for lack of subject matter jurisdiction (Doc. # 10). The Court
26 held that Plaintiff failed to satisfy her burden of establishing subject matter jurisdiction because
27 the complaint, on its face, failed to allege that the dispute arose under federal law or diversity
28 of citizenship. Specifically, the Court found that the complaint asserted the FAA as the basis
for subject matter jurisdiction, which does not in and of itself confer subject matter jurisdiction

1 over an arbitration award.

2 On April 1, 2009, Plaintiff filed the first amended complaint (“FAC”) (Doc. # 11),
3 which is the operative pleading in this case. The FAC states: “The Court has jurisdiction over
4 the instant case pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, et seq.” *FAC*, p. 1. The
5 FAC alleges that “all claims for damages for physical injuries against defendant [] were
6 governed by a ‘Tort Claims Ordinance’” (“Ordinance”) duly enacted by Defendant. *Id.*, ¶ 6.
7 The FAC alleges that Plaintiff pursued her claim pursuant to the Ordinance, and that Plaintiff
8 ultimately received an arbitration decision awarding Plaintiff the sum of \$160,000.00. The
9 FAC alleges that the Ordinance “states that ‘the decision of an arbitrator on an appeal may be
10 enforced in the United States District Court for the Southern District of California under the
11 Federal Arbitration Act.’” *Id.*, ¶ (quoting section IX(B) of the Tribal Ordinance). The FAC
12 alleges that the Ordinance was enacted to comply with the class three gaming compact (“Tribal
13 Compact”) between Defendant and the State of California, which in turn derives from the
14 Indian Gaming and Regulation Act (“IGRA”), 25 U.S.C. section 2710, the “Federal enactment
15 governing Indian Gaming regulation.” *Id.*, ¶ 10. The FAC alleges: “By failing to honor
16 plaintiff’s finally adjudicated claim for damages, pursuant to the [Ordinance], [Defendant]
17 stands in violation of that ordinance, the underlying [Tribal Compact], and the provisions of
18 25 U.S.C. section 2710.” *Id.*, ¶ 12. The FAC seeks a judgment “[i]n the amount of \$160,000
19 awarded by the arbitrator herein.” *Id.*

20 On April 13, 2009, Defendant filed the Motion to Dismiss for Lack of Jurisdiction.
21 Defendant moves to dismiss the FAC for lack of subject matter jurisdiction pursuant to Rule
22 12(b)(1) of the Federal Rules of Civil Procedure. On April 27, 2009, Plaintiff filed the
23 Opposition to the Motion to Dismiss (Doc. # 15). On May 5, 2009, Defendant filed the Reply
24 (Doc. # 16).

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Analysis

A. Subject Matter Jurisdiction

Defendant contends that, like the original complaint, the “FAC identifies the FAA as the sole basis for the exercise of federal jurisdiction,” and that the FAA does not bestow federal jurisdiction. *Mot. to Dismiss*, p. 2. Defendant contends that “even if the FAC is construed to assert that the IGRA, the [Tribal Compact], and the Ordinance provide independent bases for the exercise of federal question jurisdiction, those assertions fail as a matter of law.” *Id.* Defendant contends that the IGRA “provides no private right of action of the sort brought by [Plaintiff] here.” *Id.* (internal quotations omitted). Defendant contends that Plaintiff’s “attempt to premise federal jurisdiction on [Defendant’s] alleged violation of the Compact fails for a similar reason” because the “Compact does not create rights or obligations that can be enforced by a private citizen like” Plaintiff. *Id.* at 4. Defendant contends that the Ordinance is not a federal law on which the Court’s jurisdiction can be based. Based on the foregoing, Defendant requests that the Court dismiss the FAC for lack of subject matter jurisdiction.

Plaintiff contends that the Ordinance was enacted pursuant to the Tribal Compact, and that the Tribal Compact derives from the provisions of the IGRA. Plaintiff therefore contends that the Court has subject matter jurisdiction over the action because it arises from the provisions of the IGRA, and derivative enactments such as the Ordinance. Plaintiff also contends that, pursuant to the Ordinance, Defendant has waived its sovereign immunity with respect to the enforcement of the arbitrator’s award.

“The party asserting jurisdiction bears the burden of establishing subject matter jurisdiction on a motion to dismiss for lack of subject matter jurisdiction. . . . Dismissal for lack of jurisdiction is appropriate if the complaint, considered in its entirety, on its face fails to allege facts sufficient to establish subject matter jurisdiction.” *In re Dynamic Random Access Memory Antitrust Litig. v. Micron Technology, Inc.*, 546 F.3d 981, 985 (9th Cir. 2008).

1 The FAA “does not create any independent federal-question jurisdiction.” *Carter v.*
 2 *Health Net of Cal., Inc.*, 374 F.3d 830, 833 (9th Cir. 2004) (quoting *Moses H. Cone Mem’l*
 3 *Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.2 (1983)). “‘As for jurisdiction over
 4 controversies touching arbitration,’ [the FAA] is something of an anomaly in the realm of
 5 federal legislation: ‘It bestow[s] no federal jurisdiction but rather requir[es] an independent
 6 jurisdictional basis’ over the parties’ dispute.” *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1272
 7 (2009) (quoting *Hall St. Assocs., L.L.C. v. Mattel, Inc.* 128 S. Ct. 1396 (2008)). “[T]he
 8 presence of federal questions in an underlying arbitration is insufficient to provide an
 9 independent basis for federal question jurisdiction to review an arbitration award under the
 10 FAA.” *Carter v. Health Net of California*, 374 F.3d 830, 836 (9th Cir. 2004). “[F]ederal
 11 jurisdiction may still lie if the ultimate disposition of the matter by the federal court necessarily
 12 depends on resolution of a substantial question of federal law.” *Id.* (quoting *Luong v. Circuit*
 13 *City Stores*, 368 F.3d 1109, 1111 (9th Cir. 2004)); *see also Carter*, 374 F.3d at 836 (“the
 14 grounds asserted for federal review in a well-pleaded petition” determine whether federal
 15 jurisdiction exists).

16 *Wisconsin v. Ho-Chunk Nation*, 463 F.3d 655 (7th Cir. 2006) (abrogated in part on other
 17 grounds in *Vaden*, 129 S. Ct. at 1272), is factually analogous to this case. There, the plaintiff
 18 filed a federal lawsuit to compel arbitration and to appoint an arbitrator. The plaintiff asserted
 19 that the dispute arose out of a tribal gaming compact between an Indian tribe and state, and
 20 “since a gaming compact is a creation of federal law and since IGRA governs the scope of the
 21 compact, [] this case arises under federal law.” *Id.* at 660. The court disagreed, stating:

22 The complaint does not present the district court with any claim for a violation
 23 of the IGRA, require an interpretation of the IGRA, encompass any of the
 24 situations for which the IGRA confers jurisdiction, or even require the district
 25 court to address a breach of the compact that was formed pursuant to the IGRA.
 26 Wisconsin’s complaint simply requests that the district court compel arbitration.
 Without more, and without incorporating the Nation’s underlying complaint in
 arbitration, this complaint does not present a federal question over which the
 court has jurisdiction.

27 *Id.* at 661.
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1 In this case, the FAC alleges that Plaintiff arbitrated her claim against Defendant
 2 pursuant to the Ordinance, and was awarded \$160,00.00. Plaintiff seeks to enforce the
 3 arbitration award in this Court. The FAC alleges that the Ordinance was enacted to comply
 4 with the Tribal Compact, which is governed by the IGRA. Aside from the conclusory
 5 allegation that Defendant “stands in violation of” the Ordinance, the Tribal Compact and the
 6 IGRA, the FAC does not allege any facts to support how Defendant violated the IGRA, or any
 7 other federal law, by allegedly failing to comply with the arbitrator’s award. *FAC*, ¶ 12. This
 8 case simply requests that the Court enforce an arbitration award. The FAC, on its face, does
 9 not require an interpretation the IGRA or any other federal law in order to determine whether
 10 enforcement of the arbitration award is proper. The FAC, on its face, does not require
 11 resolution of a substantial issue of federal law in order to resolve the matter. *See Carter*, 374
 12 F.3d at 836. The allegation that the Ordinance stated that an arbitrator’s award is enforceable
 13 in this Court is insufficient to give rise to subject matter jurisdiction because parties may not
 14 agree to confer subject matter jurisdiction when none exists. *See Kolbe v. Trudel*, 945 F. Supp.
 15 1268, 1270 (D. Az. 1996) (“Either subject matter jurisdiction exists or it does not exist, a
 16 matter independent of the parties’ agreement.”). It is Plaintiff’s burden to establish subject
 17 matter jurisdiction over this action. *In re Dynamic Random Access Memory Antitrust Litig.*,
 18 546 F.3d at 985. The Court concludes that Plaintiff has failed to satisfy this burden because
 19 the FAA itself does not create subject matter jurisdiction, and the FAC, on its face, fails to
 20 allege a federal question or diversity of citizenship.¹

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 24 ¹ Plaintiff’s reliance on *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida*, 63
 25 F.3d 1030 (11th Cir. 1995), is misplaced. *Tamiami* involved claims for breach of contract against an
 26 Indian tribe, and abuse of the licensing authority conferred by the IGRA against an Indian tribe and
 27 individual defendants. *Tamiami* held that the claim for breach of contract presented a federal question
 28 because the subject contract incorporated the regulations prescribed in the IGRA such that an
 interpretation of the contract would necessarily require an interpretation of the IGRA. *Tamiami* held
 that the claims for abuse of licensing authority were directly based on provisions in the IGRA that
 confer original jurisdiction. Unlike *Tamiami*, this case does not require interpretation of the IGRA
 in order to resolve the matter, and the IGRA does not confer original jurisdiction over Plaintiff’s
 claim.

1 B. Leave to Amend

2 Plaintiff states : “[s]hould the court require explicit amendment of the complaint to
3 allege bad faith implementation of an IGRA derived ordinance, this can easily and truthfully
4 be accomplished.” *Opposition*, p. 3-4. Defendant requests that the Court dismiss the FAC
5 with prejudice on grounds that Plaintiff “has now had two opportunities to demonstrate that
6 her complaint should not be dismissed,” and “does not deserve a third.”

7 Rule 15 of the Federal Rules of Civil Procedure mandates that leave to amend “be freely
8 given when justice so requires.” Fed. R. Civ. P. 15(a). This policy is applied with
9 “extraordinary liberality.” *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079
10 (9th Cir. 1990). Once an answer to the complaint has been filed, as is the case here, courts
11 may deny leave to amend where the proposed amendment would be futile, where it is sought
12 in bad faith, where it will create undue delay, or where “undue prejudice to the opposing party
13 will result.” *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973); *see also Johnson*
14 *v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir. 1992).

15 Defendant does not assert that amendment is sought in bad faith, will create undue
16 delay, or would prejudice Defendant. The Court grants Plaintiff leave to amend.

17 Conclusion

18 IT IS HEREBY ORDERED that the Motion to Motion to Dismiss the First Amended
19 Complaint (Doc. # 12) **GRANTED**. The above-captioned action is **DISMISSED with leave**
20 **to amend**. Plaintiff shall file a second amended complaint within forty-five (45) days of the
21 date of this Order.

22 DATED: June 30, 2009

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24 **WILLIAM Q. HAYES**
25 United States District Judge
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